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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

Nos. 776 and 780

THE CALIFORNIA COMPANY and THE SUPERIOR OIL COMPANY, *Petitioners*,

v.

THE UNITED GAS IMPROVEMENT COMPANY and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Respondents*.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT THE UNITED GAS IMPROVEMENT COMPANY IN OPPOSITION

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OPINIONS BELOW

The order of the Federal Power Commission (R. 147-153) is reported at 22 FPC 252; the order denying rehearing (R. 179-181) is reported at 22 FPC 653. The opinion of the United States Court of Appeals for

the Ninth Circuit (Calco Pet. App. 1a-16a; Superior Pet. App. 1a-16a)[1] is reported at 283 F. 2d 817.

JURISDICTION

The Judgment of the Court of Appeals was entered on October 31, 1960 (Calco Pet. App. 16a; Superior Pet. App. 17a). Petitions for rehearing, timely filed, were denied on December 7, 1960 (Calco Pet. App. 17a). The petitions for writs of certiorari were filed on March 2, 1961 (No. 776) and March 4, 1961 (No. 780). This Court has jurisdiction under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTION PRESENTED

Was the court below correct in concluding (as have three other Courts of Appeals) that the Federal Power Commission, consistent with its obligation to protect gas consumers under the Natural Gas Act as interpreted in this Court's *CATCO* decision,[2] could not finally certificate gas producer sales at a price representing a sharp increase over pre-CATCO contract prices in the same area, where the only support offered for the challenged price was the existence of other pre-CATCO decision prices in the area certificated by the Commission prior to *CATCO* on equally defective records and under an erroneous view of law?

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[1] The petitions for certiorari filed by The California Company (No. 776) and The Superior Oil Company (No. 780) have been abbreviated "Calco Pet." and "Superior Pet.", respectively.

[2] *Atlantic Refining Co.* v. *Public Service Comm'n*, 360 U.S. 378 (1959).

STATEMENT

The California Company and The Superior Oil Company (Petitioners) seek from the Federal Power Commission unconditioned certificates of public convenience and necessity authorizing the sale of natural gas in interstate commerce from fields in South Louisiana at an initial price of 23.8 cents per thousand cubic feet (per Mcf).[3]

The hearings before a Commission examiner occupied a single day, March 17, 1959, during a period when Commission precedents provided (1) that natural gas producers could justify an initial price in a certificate case merely by showing a market for the gas at the proposed price,[4] and (2) that proponents of a price condition not only had the burden of showing that the contract price was not justified but also had the burden of establishing the reasonableness of a proposed alternative price.[5]

Petitioners, relying expressly on these rulings (R. 3), introduced only their contracts (R. 39-80, 87-125) plus testimony concerning reserves (R. 5, 7), the need of the purchaser for the gas (R. 7-11), the inability of the purchaser to obtain the gas at any lower price (R. 5) and the existence of arms-length bargaining (R. 5-6, 29-30, 32). Petitioners did *not* introduce evidence of other existing prices in the area, although

[3] Of this total, 2.3 cents per Mcf was allocated by the parties to pay state taxes (R. 59-60, 114-15).

[4] I.e., merely by submitting a bona fide sale contract with a non-affiliated pipeline company. See, e.g., *Hope Natural Gas Company*, 19 FPC 405 (1958).

[5] See e.g., *Seaboard Oil Company*, 19 FPC 416, 420, 423 (1958) (Opinion No. 369).

one witness mentioned the initial prices of some six sales certificated from the same area without otherwise identifying the sales on the Commission's records (R. 34-35).[6]

Another applicant witness, on cross-examination, referred to "30 or 40 or 50" certificates in South Louisiana with a base price of 21½ cents per Mcf but did not otherwise identify them (R. 14).

Petitioners conceded, however, that the proposed price was the *highest* ever paid in that area by the buyer (R. 15) or received there by Petitioners (R. 30, 38).

The *CATCO* decision, which overturned the Commission's position on the burden of proof in initial price proceedings, was handed down in June, 1959, 360 U. S. 378, several months after the March 17th hearing in this case. On August 4, 1959 the Third Circuit Court affirmed the Commission in the so-called *Transco-Seaboard* proceeding subsequently reversed by this Court.[7] Immediately thereafter, on August

[6] The witness, in mentioning these sales, did not describe the substantiality of the volumes involved, the finality of the certificates or their comparability with the contracts in issue, e.g., as to nature of gas reserves, quality of gas, and facilities provided or services performed (R. 34-35). All but one of the orders apparently referred to were ultimately reversed on appeal. The Sun Oil Company sale to United Gas Pipe Line Company, 22 FPC 351, was reversed in *United Gas Improvement Co.* v. *FPC*, No. 18115, CA5 (February 22, 1961); various sales to Transcontinental Gas Pipeline Corporation were reversed in *Public Service Comm'n* v. *FPC*, 361 U.S. 195 (1959). Respondents were precluded by Commission intervention policy from challenging the sale to Southern Natural Gas Company. See, e.g., *Trunkline Gas Company*, 22 FPC 110 (1959).

[7] *Public Service Comm'n* v. *F.P.C.*, 367 U.S. 195 (1959).

7 and 10, 1959, the Commission issued six decisions, of which the order under review was one, unconditionally certificating South Louisiana sales in the 22-24 cent initial price range on substantially similar records.

The Commission's orders, couched in virtually identical terms in all six cases, relied primarily on the bare existence of certain unidentified field prices, at or higher than the CATCO level, in sales made following the execution of the CATCO contracts but before this Court's *CATCO* decision (R. 150-151). The Commission regarded these unidentified sales as establishing a "line" on which it could rely in authorizing the instant sale.[8]

Respondent, UGI, which had been permitted to intervene in four of the proceedings, including the instant case, sought rehearing of four of the orders. Respondent Public Service Commission, which had intervened in all five cases, also sought rehearing.[9]

When these petitions for rehearing were denied, respondents obtained review of the instant order in the Ninth Circuit, and of the other orders in the Courts of Appeals having jurisdiction over the respective orders under Section 19(b) of the Natural Gas Act.

[8] The Commission also relied on the fact that there would be no "triggering" of "favored-nation" price clauses as a result of the proposed price and on the pipeline's "need" for the gas (R. 151-152).

[9] The sixth order, in *South Georgia Natural Gas Co.*, 22 FPC 211, became final since neither respondent was eligible in the Commission's view (*see Trunkline Gas Co.*, 22 FPC 110) to participate in that proceeding.

(15 U.S.C. § 717r(b)).[10] The court below, as well as the Courts of Appeals for the Fifth, Tenth and District of Columbia Circuits, reversed. (These opinions are reprinted in the petition seeking review of the District of Columbia Circuit decision, *Shell Oil Company* v. *P.S.C. of New York*, No. 774, This Term, pp. 49-85). Although the opinions differ somewhat in emphasis and detail, the courts are unanimous in holding that the Commission erred when it relied on "pre-*CATCO*" decision prices (which were the progeny of the presently still unauthorized and "suspect" CATCO price)[11] in finding that the proposed prices (four of which exceeded the CATCO price) met the public convenience and necessity. The gravamen of the five opinions is the following statement from the opinion below (Calco Pet. 10a-11a) which is quoted and adopted in the decisions of the District of Columbia and Fifth Circuits, and partially quoted and fully

[10] Respondent Public Service Commission of New York sought review of the order in *Texas Gas Transmission Corp., et al.*, 22 FPC 378, rev'd, *Public Service Comm'n* v. *FPC*, No. 15,461, CADC (December 8, 1960), cert. pending sub nom. *Shell Oil Co.* v. *Public Service Comm'n*, Nos. 774, 793, Oct. Term 1960 (Opinion printed Shell Pet. 28-33). Respondent The United Gas Improvement Company sought review of the other four: *Sunray Mid-Continent Oil Co.*, 22 FPC 361, rev'd, *United Gas Improvement Co.* v. *FPC*, No. 6280, CA10 (January 23, 1961) (Opinion printed Shell Pet. 49-55); *Sun Oil Co.*, 22 FPC 351, rev'd, *United Gas Improvement Co.* v. *FPC*, No. 18,112, CA5 (February 22, 1961) (Opinion printed Shell Pet. 56-66, 69-85); *The Superior Oil Co.*, 22 FPC 369, rev'd, *United Gas Improvement Co.* v. *FPC*, No. 18,113, CA5 (February 22, 1961) (Opinion printed Shell Pet. 67-85); and the instant case, *The California Co., et al.*, 22 FPC 252, rev'd, *United Gas Improvement Co.* v. *FPC*, 283 F. 2d 817 (9th Cir. 1960).

[11] The *CATCO* proceeding has not yet been decided on remand

concurred in by the Tenth Circuit (Shell Pet. pp. 31, 52, 64-65):

> When an order certificating an initial price is under Court or Commission review, it is possible that the certificate may be eventually denied or price conditions may be attached. In our opinion an existing rate subject to such a hazard does not provide a reasonably reliable basis upon which to predicate a price line. In the event the existing rate is later modified or conditioned as a result of the pending proceedings the foundation of the line derived therefrom would be undermined. Moreover, the acceptance of questioned existing prices as a guide in setting the line might itself have the anomalous effect of creating a standard by which the questioned rates would then be judged.
>
> For the reasons indicated we are of the opinion that it would be an abuse of discretion for the Commission in establishing a price line to rely upon producer prices which are under such a cloud.
>
> We go further and express the view that where a substantial number of certified prices are thus under court or Commission review, like prices in the same area though not currently under review ought to be regarded as suspect. In such circumstances it would seem that such similar prices ought not to be relied upon in fixing a line except upon evidence and findings to the effect that they are not subject to the same infirmities which are under test in the pending proceedings.

ARGUMENT

Immediately following this Court's *CATCO* decision, the Federal Power Commission certificated six substantial South Louisiana natural gas sales at prices as high as or higher than the questioned CATCO price. The Commission in all of these proceedings relied

primarily on its general awareness, *dehors* the respective records, that, following execution of the 1956 CATCO sale contract, it had authorized a number of additional sales at or above the CATCO price level. The Commission concluded that the bare existence of these contract prices was sufficient to support the instant price, despite the fact that they were at or above the CATCO level and many were then being challenged in the Commission and the courts.

When five of these Commission orders were appealed, four Courts of Appeals,[12] including the court below, applying this Court's *CATCO* decision, held that the Commission, pending establishment of just and reasonable rate levels, could not—consistent with the Gas Act's policy of consumer protection—select as an interim base "line" from which to certificate sales in South Louisiana *without* price conditions the very "suspect" price level which had set an unprecedented new high for South Louisiana in *CATCO*, and which was and is still under consideration by the Commission.

The decisions of the four Courts of Appeals are in substantial agreement and the result reached by the four courts is clearly consistent with, and indeed compelled by *CATCO*. The Commission, apparently acquiescing in the rule stated in these cases, has not sought review. Since the principles governing the application of Section 7 to producer rates have been clearly stated both in *CATCO* and these decisions, there is manifestly no need for this Court to explore further what is actually the *temporary* problem of providing

[12] Eleven circuit judges joined in these opinions; Judge Brown of the Fifth Circuit dissented in two of the cases which were argued jointly.

consumer protection against "vaulting" initial gas prices during the preliminary stages of producer regulation.

Hence, there is no warrant for certiorari in this case.

1. The order of the Commission reversed by the Ninth Circuit approved a price in South Louisiana exceeding the CATCO sale price by 1.4 cents per Mcf.[13] This price exceeded by 10.14 cents per Mcf the weighted average price (13.66 cents per Mcf) paid for gas by major pipelines in 1958 jurisdictional sales (R. 175), and should be contrasted with the average cost of approximately 12 cents per Mcf found by the Commission for Phillips Petroleum Company's production in 1954 and 1956 (*Phillips Petroleum Company*, 24 F.P.C. —, Opinion No. 338, September 28, 1960). The price, like the CATCO price, represented a sharp increase over the level at which practically all gas was committed to the interstate market prior to the CATCO contract. The Commission was instructed in *CATCO* that the Natural Gas Act requires it to protect consumers by appropriate price conditions against such "suspect" and possibly unlawful charges, pending a determination in other proceedings of the producers' actual costs and revenue needs.[14] The Court of Appeals has merely reaffirmed that instruction.

[13] 23.8 cents per Mcf. The CATCO price appeared to be 22.4 cents per Mcf, including tax reimbursement, at the time of this Court's *CATCO* decision. However, as a result of this Court's decision in *United States* v. *Louisiana*, 363 U.S. 1 (1960), the CATCO price appears to be 21.4 cents per Mcf.

[14] The parties in the instant case contemplate sales of 30 billion cubic feet per year (R. 17). Assuming a current "just and reasonable" rate for South Louisiana approximating the 1958 weighted average of 13.66 cents per Mcf, *supra*, the effect of the Commission's decision would have been to overcharge the ultimate consumer—without hope of reparation—at the rate of $3,042,000 per year on this sale alone.

2. Petitioners argue that the holdings of the four Courts of Appeals unduly limit the Commission's discretion under Section 7 of the Act (Calco Pet. 9-11; Superior Pet. 12-13) and handicap the Commission in disposing expeditiously of producer certificate proceedings (Calco Pet. 8, 14-15; Superior Pet. 8-9, 12). The short answer to these fears is that the Commission apparently does not share them, since it has not sought review. Moreover, the fact that the Commission cannot rely on prices certificated under an erroneous view of law is hardly a procedural handicap or limitation on the Commission's discretion in authorizing producer sales, since there is no reason why the Commission cannot follow the course suggested by *CATCO*, and condition the price pending further information as to producer costs and revenue needs.[15]

[15] Petitioner Superior (but not California) asserts (Pet. 16) that two conclusions by the court below (that the Commission cannot rely on "suspect" prices, and must consider tax reimbursement) were not raised in respondent UGI's rehearing petition, and hence could not be passed upon by that court. The argument seems at most to suggest a distinction without a difference, since respondent UGI's petition for rehearing vigorously attacked the level of the full 23.8 cents per Mcf price (including tax reimbursement) (R. 165) and argued that the Commission could not rely on pre-*CATCO* decision prices certificated under an erroneous view of the law (R. 168). Respondent, in any case, did not know until the filing of the Commission's brief in the Court of Appeals that the Commission had actually relied on prices then subject to court review, for it was in that brief that the "price line" argument was first developed by the Commission's Solicitor and attributed to the Commission (Calco Pet. 11a, fn. 6).

CONCLUSION

For these reasons it is respectfully requested that the petitions for certiorari be denied.

Respectfully submitted,

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